

Grand jury system questioned 🗞️

‘Pick-a-pal’ selection process stacks group with political players

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The grand jury that indicted a man who often criticizes local government had multiple ties to City Hall and to the victim of the alleged crime, a *Denton Record-Chronicle* investigation found.

Bob Clifton, a retired businessman, once branded a vexatious litigant by a visiting judge after he filed four lawsuits against the city in two years, stands accused of asking Mayor Mark Burroughs to pay him to abandon the 2010 mayor’s race.

One grand jury member who indicted Clifton heads a city department.

One was a former mayor.

One served on Burroughs’ re-election committee.

Four had donated to at least one of Burroughs’ mayoral campaigns.

And despite a state law meant to ensure that grand juries reflect the county’s demographic and geographic makeup, most members of the grand jury that indicted Clifton and 600 other people last year were white males, residents of Denton, or both. More than 530,000 people live elsewhere in Denton County, yet 11 of the 12 grand jurors live in Denton, Corinth and Argyle — cities with a combined population of less than 137,000. Women and racial minorities were also underrepresented.

The *Record-Chronicle* investigated the grand jury array after reporting that two members — former Mayor Perry McNeill and David Gosdin, husband of the current mayor pro tem, Pete Kamp — were asked by the district attorney to abstain because their names would come up as part of the evidence in the case.

The findings raise questions about the fairness of grand jury selection under the “key-man” system, a method used throughout much of Texas whereby an appointed commission — not random selection — determines who sits on grand juries.

The U.S. Supreme Court has long held the key-man system is constitutional but vulnerable to abuse. Court rulings and academic studies have found the system tends to favor the powerful and

disenfranchise racial minorities, the poor, women and the young. Those factors led most states and the federal government to abandon the system in favor of a more random process.

“The big disadvantage of the key-man system is the disenfranchisement of a large section of the population,” said Greg Hurley, an analyst with the Center for Jury Studies, part of the National Center for State Courts, a nonprofit court improvement organization. “Due to that, there have been a number of cases that struck it down in many jurisdictions.”

Only Texas and California still use a key-man system to select grand juries, Hurley said.

In Texas, judges can decide between the two methods. District Judge L. Dee Shipman, who presided over the grand jury that indicted Clifton, said both methods have pros and cons.

The commission system is the primary method in state law and tends to produce more “pillars-of-the-community-type” people compared with the alternative of random selection, Shipman said. Texas uses a random process to select trial juries.

Shipman did not believe there was anything unusual about the grand jury that indicted Clifton.

“It was made up just like any other grand jury,” he said. “The same process is used that’s used year-in, year-out [and] month-in, month-out all over the state of Texas, as prescribed by the Legislature.”

Potential conflicts of interest



Mark Burroughs



Bob Clifton

The *Record-Chronicle* reported in January that the grand jury included former Mayor McNeill and Gosdin, the husband of Mayor Pro Tem Pete Kamp. McNeill, Kamp and Burroughs were targets of a Clifton-backed lawsuit accusing the city of allowing term limit violations in 2008.

Clifton and McNeill were also political rivals in 2006 as two of the three candidates for mayor, in a race McNeill won.

Both McNeill and Gosdin have said they abstained from the Clifton case because of potential conflicts of interest.

But the *Record-Chronicle*'s investigation of court documents, campaign finance reports and other public records found the potential for conflicts ran wider than previously known.

Also, the grand jury indicted Clifton even though a Denton County sheriff's investigator determined twice that there was no evidence Clifton committed bribery — a conclusion echoed by a representative from the district attorney's office, according to sheriff's reports obtained by the newspaper. The grand jury also indicted Clifton on a charge of tampering with a governmental record, alleging that he used a false address to run for mayor.

Clifton is still awaiting trial. He faces up to 20 years in prison if found guilty of bribery. The tampering charge, a Class A misdemeanor, carries up to a year in jail and a \$4,000 fine.

Clifton has denied the charges, saying he approached Burroughs during the 2010 election to try to settle an outstanding lawsuit, not to ask for money to leave the race.

Burroughs, a lawyer, said he was unaware of how grand jurors are chosen, adding that he played no role in the selection process.

In jury trials, potential jurors are questioned to weed out those with conflicts of interest, but grand jurors face no such scrutiny. By law, anyone can challenge the makeup of a grand jury, but the challenge must come before the grand jury is impaneled.

Clifton's attorney, Charles Orsburn, challenged the grand jury's makeup months after the indictments, during a hearing in March, saying the members were all part of the same socioeconomic class. District Judge Steve Burgess denied a motion to dismiss the indictments for that reason, saying he heard no evidence to support the challenge.

Orsburn said the *Record-Chronicle*'s findings confirmed his suspicions.

“It couldn't just be a coincidence that all of these people with a political motive to stop Clifton and his criticism of Burroughs were on the grand jury,” Orsburn said.

The grand jury system historically was an attempt to ensure prosecutions were free of political influence, Orsburn said.

“This case shows it can be turned on its head and can be used for the very evil it was originally conceived to prevent,” he said.

The district attorney’s office presents cases to the grand jury but plays no role in selecting grand jurors, said Jamie Beck, first assistant district attorney.

In Clifton’s case, prosecutors asked McNeill and Gosdin to abstain because they planned to play a recording that mentioned their names, Beck said. They also asked the remaining grand jurors if they knew Burroughs or Clifton, and four said they did and were given a chance to abstain, she said.

“None of them wanted to abstain,” Beck said. “We did not know, nor did we explore, how they knew them [Burroughs or Clifton]. The things you’re revealing to us, we did not know and they did not volunteer.”

The finding that there was no evidence Clifton committed bribery was an excerpt of a Denton County sheriff’s report and didn’t reflect other evidence gathered by the state, Beck said.

Unlike in some criminal cases, Clifton had not been arrested or charged with a crime before the indictments. Prosecutors wanted a grand jury to decide probable cause in the case because it involved a public figure, Beck said.

“We wanted to put that distance between us and have a neutral, independent body decide,” Beck said. “We had no idea of these connections, so we weren’t in any way involved in any politically motivated stacking of the grand jury.”

Past feuds

Both indictments against Clifton stemmed from complaints brought by Burroughs or his law firm, Sawko & Burroughs PC, according to public records and interviews. Denton city prosecutor Stephanie Berry is listed as the complainant in the tampering case, but Berry has said she filed the complaint after a lawyer at Burroughs’ firm approached her with evidence that Clifton was not living in Denton.

Burroughs was in regular contact with Sheriff Benny Parkey and investigators between March and July of last year, according to investigators’ reports. At one point, Burroughs asked an investigator to delay filing the bribery case until the city filed the tampering case because “he felt that it would appear that he, the county and the city of Denton were conspiring against Bob Clifton,” the investigator wrote.

Burroughs told the *Record-Chronicle* he did not recall making those comments.

“That must have been his [the investigator’s] language or his interpretation,” Burroughs said. “That has nothing to do with me.”

In a January interview, Clifton said Burroughs had targeted him since 2008, when Clifton distributed a series of mailers attacking Burroughs' first mayoral campaign over potential conflicts of interest. Sawko & Burroughs earns money from collecting delinquent taxes for area cities including Denton.

Burroughs sued Clifton over the 2008 mailers, saying he violated the law by failing to disclose who paid for them. Clifton later filed finance-disclosure reports and paid a \$200 fine to settle a state ethics investigation, but Burroughs never dropped the lawsuit.

Burroughs, in a June 2010 interview, said the state ethics investigation was limited and didn't address all the issues in his lawsuit. He also said he was using the case to explore Clifton's residency.

Finding a neutral body

By law, grand juries meet in secret to hear evidence from prosecutors and decide whether probable cause exists to indict someone for a crime.

In most jurisdictions across the U.S., grand jurors are selected from the same pool and in the same way as trial juries, according to the American Bar Association. That means names are randomly picked from voter rolls, motor vehicle lists or other databases.

Texas used the key-man system exclusively until 1979, when the Legislature started allowing state district judges to choose whether to select grand jurors through an appointed commission or a more random process.

Denton is among the counties that use a commission, where a judge appoints three to five commissioners to pick potential grand jurors. Among other requirements, commissioners are supposed to be "intelligent citizens" who live in different parts of the county.

The commission compiles a list of 15 to 40 potential grand jurors, and the court uses the list to impanel the 12 grand jurors and two alternates needed for each three-month grand jury term. The grand jurors are supposed to represent a broad cross-section of the population, including such factors as race, sex and age, according to state and federal law.

To comply with the law, Shipman said he instructs the commissioners to nominate a diverse group. Once the group is summoned, however, Shipman said he allows potential grand jurors to opt out if they meet one of the exemptions under the law or if service could be a hardship for them.

Austin lawyer Jim Harrington, whose lawsuit over a lack of minorities on grand juries in Hidalgo County in the 1970s helped lead to the change in state law, said the key-man system tends to exclude everyone but white men.

“It’s the judge picking five friends who then pick their friends, and the judge picks 12 people from that,” said Harrington, director of the Texas Civil Rights Project. “The jury is basically going to look like the judge. It typically doesn’t represent a cross-section of the community.”

Connections found

The grand jury that indicted Clifton in December was a product of a commission appointed by Shipman, who presides over the 211th District Court.

The commission included two Denton residents, George Hopkins and Jeff King, along with Ricky Grunden of Krum, Johnny Hunter of Pilot Point and Roberta Brazil of Carrollton.

Shipman could not recall how he selected commissioners for that term, saying he typically picks acquaintances or former grand jurors with good reputations in the community.

Records show Brazil did not participate in selecting grand jurors. Reached by phone, Brazil said the judge excused her from service because she had recently started a new job.

Two of the four remaining commissioners had political ties to Burroughs, Kamp or council member James King, the twin brother of grand jury commissioner Jeff King. James King served on Burroughs’ 2008 campaign committee and his wife, Melinda, served on Burroughs’ re-election committee last year.

Jeff King, who runs an insurance agency with his brother, said James King had “no bearing whatsoever” on the process and did not suggest names for the grand jury.

“There were no outside influences,” Jeff King said.

Hopkins served on Kamp’s 2010 re-election committee and donated \$100 each to Kamp, James King and Burroughs that year, according to campaign finance reports. Hopkins’ wife, Jane Hopkins, served as Kamp’s campaign treasurer.

George Hopkins downplayed the connections, saying he and his wife have supported many candidates over the years.

The commissioners produced a list of 40 potential grand jurors, who were summoned to court for final selection. Of the 12 selected by Shipman, only five had no obvious ties to Burroughs or the city government.

Two alternates were selected but weren’t called on to serve.

Shipman could not recall details of the selection but believed he picked the first 12 people who were both eligible and willing to serve, he said. He did not know Clifton’s case was coming before that grand jury when he assembled it, he said.

Some of those involved had donated money to Shipman's judicial campaigns.

Campaign finance reports show Shipman has received \$450 from Burroughs and his law firm, Sawko & Burroughs, since 2005. The reports also show past donations from one of the grand jurors, Kay Copeland, and the law firm of Alagood & Cartwright P.C. Scott Alagood, a partner in the firm, is married to grand juror Dawn Alagood.

Shipman said the donations were irrelevant and represented a fraction of the \$100,000 to \$150,000 cost of running a successful race for district judge.

Hopkins defended the commission's work and said the *Record-Chronicle* was "out on a joy ride." Hopkins, a former assistant county attorney, handled grand juries in the late 1940s.

"In years gone by, the grand jury probably had all white, well-educated people living in Denton," Hopkins said. "Over the years that has drastically changed."

The list of 40 potential grand jurors represented a fair cross-section of the community, including racial minorities and people from southern Denton County, Hopkins said. Several potential grand jurors were suggested by more than one commissioner.

"Our job was to get an impartial bunch," Hopkins said. "I think when you have a system such as we have, you're going to be inclined to wind up with names of people that you know or know of."

He never got the impression there was an agenda behind any of the commissioners' picks, Hopkins said. He and other commissioners interviewed for this story said they did not know which cases were coming before the grand jury when they recommended names to the judge.

"It was entirely random," Jeff King said.

King said the court provided commissioners a list of names to choose from, and he thought the list was based on voter rolls. Two other commissioners, Hopkins and Grunden, said they simply suggested names and didn't use voter rolls.

Hunter could not be reached for comment.

The political connections extended to many of the grand jurors. Some had more than one connection, including Gosdin, who is married to Kamp and served on Burroughs' 2010 re-election committee.

Gosdin declined to comment.

Another grand juror, Jack Miller, is a former mayor and a Burroughs donor whose wife, Evelyn Miller, served on Burroughs' re-election committee.

Jack Miller said he considered abstaining from Clifton's case but decided he could be impartial.

“I explained [to the district attorney’s office] that I’d served as mayor of Denton and I was asked could I be objective,” Miller said. “The answer was yes and it still is.”

The grand jury also included Sue Fickey of Corinth and Marc Moffitt of Denton, who each donated money to Burroughs’ 2008 campaign, and Charles Parker of Denton, a Burroughs committee member and donor.

Fickey said her \$100 donation to Burroughs’ 2008 campaign did not impair her ability to judge a criminal case in which Burroughs is the alleged victim.

Moffitt is a candidate for county tax assessor and is pictured on his campaign website posing with political figures including Burroughs.

In interviews, Moffitt and Parker each described Burroughs as a friend. They said their friendship did not prevent them from being fair judges in Clifton’s case, although Parker said he considered abstaining because of the friendship.

“If there’s a suggestion that there may be some groupthink that takes place in the grand jury, I would strongly disagree with that statement,” Moffitt said.

Unanimous votes

Court records show grand juror Fran Hannah was absent Dec. 16, the day the district attorney’s office presented Clifton’s case. Hannah, a real estate agent, said she would have abstained had she been there because she once showed houses to Clifton.

With Gosdin and McNeill abstaining and Hannah absent, that left nine grand jurors to hear Clifton’s case, meaning the votes to indict had to be unanimous. By law, at least nine grand jurors must approve an indictment.

“We had a lot of different opinions about the cases that came in except for the one about [Clifton],” grand juror Ed Coe said. “I asked a few questions because I thought, ‘Well, this, this and this.’ He was so in the wrong on this that it really — he was so blatantly a bogus candidate, and I didn’t have any personal interest or involvement or anything. He clearly wasn’t eligible and just wanted to stir things up.”

Other grand jurors either declined to comment or could not be reached.

“I am going to abide by the district attorney, who stated that everything that was done in the grand jury was secret,” said Denton libraries director Eva Poole, a grand juror whose employer, the city of Denton, has been the target of multiple Clifton-backed lawsuits.

The pool of candidates not selected for the grand jury included at least two former Denton City Council members: Bob Montgomery and Guy McElroy, another member of Burroughs’ re-

election committee. Also in the pool was Denton photographer Walter Eagleton, a Burroughs committee member who ran for City Council in 2005 against Clifton and four other candidates.

Beyond political ties, many of those involved are members of common community boards or social clubs, including the Denton Public School Foundation and the Ariel Club, a Denton women's club.

Shipman would not say whether he thought the makeup of the grand jury was fair to Clifton.

“If it were going to be a petit jury, deciding the guilt or innocence, a lot of those connections would have been explored by the attorneys probably,” Shipman said. “With a grand jury, where the focus is on probable cause, you don't have the opportunity — because you don't know what cases are coming up in front of the grand jury — to do that same evaluation.”

Even in a trial jury, most of the connections found by the *Record-Chronicle* would not automatically disqualify someone from service, Shipman said.

“The fact that somebody gave Burroughs \$100 in his re-election campaign is not going to be an automatic disqualification if he's the victim in a case,” Shipman said. “The question is going to be, ‘[Is there] anything about your relationship with Mr. Burroughs that would keep you from being fair and impartial?’”

‘A convenient system’

Key-man jury selection was common in the U.S. when only white male property owners could vote. It was gradually replaced in most states with more inclusive methods, according to the American Judicature Society, an independent fair-justice organization in Des Moines, Iowa.

Congress eliminated the key-man system in federal courts through the Jury Selection and Service Act in 1968.

Judges in Travis, Harris and Bexar counties have chosen grand jurors randomly, according to news reports.

District judge for the 399th District Court of Bexar County for 11 years, Juanita Vasquez-Gardner oversees one to two grand juries in her court each year. The people who serve are selected through the same process as petit juries and are reflective of the community, she said.

Those who are selected as grand jurors sometimes find it easier to serve because they can work around the grand jury's more predictable schedule, which is three hours two mornings a week for two months, she said. For many the pay is not a hardship either, because the \$40 per day works out to be about \$13 an hour.

Melissa Barlow Fischer, administrative attorney for all the criminal courts in Bexar County, said judges there have not used the “pick-a-pal” system in years.

“It’s a lot more difficult to do it right, in my opinion,” Fischer said.

Recently, a newly elected judge wanted to use the key-man system instead of the random selection other judges use, Fischer said. One of the staff attorneys, Ana Amici, reviewed the matter with the judge.

“It’s an antiquated system,” Amici said.

In addition, when using key-man, the state’s requirements to build a grand jury that reflects the community are strict.

“The judge finally said it was too much work in order to avoid problems later,” Amici said, adding that unlike problems with a petit jury, problems with a grand jury can affect not just one problematic case, but hundreds of indictments.

No single organization tracks which judges use the key-man system in Texas, according to state officials and legal organizations.

“They use it because it’s a convenient system,” said Larry Karson, a University of Houston-Downtown criminal justice lecturer who authored a 2006 study that found disparities in the key-man system in Harris County. “It wasn’t done with the intention to corrupt justice. It was done because that’s how we did it and it was more efficient.”

Grand jurors in Denton County get paid \$34 a day and must be willing to devote every Thursday for three months, which could be a hardship for many people. Under state law, grand jurors must be literate, of “sound mind” and “good moral character,” and have no felony or misdemeanor theft convictions.

People who meet those qualifications can avoid service if they are over age 70, a parent of a child younger than 18, a student or have another “reasonable” excuse, according to the law.

“By using key man, it was a way to cut through the chaff to get to the wheat of those willing to serve,” Karson said.

Karson’s study of Harris County grand jury commissioners in 2002 and 2003 found that more than half were directly connected to the criminal justice system as court employees, lawyers, probation officers, bail bondsmen, or retired or current law enforcement. He also found Hispanics were underrepresented on grand juries.

Karson said he believes Texas should follow most states and abandon the key-man system.

“They have managed” without it, he said. “Texas should manage, too.”

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